IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

AMERICAN STATES INSURANCE COMPANY, PLAINTIFF,

VERSUS CIVIL ACTION NO. 1:93CV176-S-D

MARY JANE NETHERY; DAPA, INCORPORATED
d/b/a SERVICEMASTER OF TUPELO;
DANNY W. MILES; AND THE SERVICEMASTER
COMPANY, LIMITED PARTNERSHIP, DEFENDANTS.

MEMORANDUM OPINION DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

This cause of action is before the court on cross motions for summary judgment. This action was filed as a declaratory judgment for the court to determine whether an insurance policy sold by the plaintiff to DAPA, Inc. d/b/a Servicemaster of Tupelo requires the plaintiff to defend and indemnify DAPA for an injury suffered by Mary Jane Nethery. The disputed issues call for the court to interpret the insurance policy, which is a question of law. It is set as a nonjury trial for January 11, 1995.

Facts[1]

[1] The parties have entered a stipulation of undisputed facts. The court only recites within its findings of fact those stipulated facts which are pertinent to the determination of the declaratory judgment. Since this cause is before the court on a declaratory judgment, the court is not concerned with the relationship of DAPA, Inc. d/b/a Servicemaster of Tupelo and The Servicemaster Company, Limited Partnership.

On August 17, 1992, Mary Jane Nethery instituted an action in the Circuit Court of Lee County, Mississippi, Civil Action No. 92-167(G)L, naming as defendants The Servicemaster Company, DAPA, Miles, Ricky Britt d/b/a Verona Carpet Warehouse, and Bobby Wright. Nethery alleges in her complaint that on July 1, 1991, she discovered that an air conditioner accident had caused damage to her living room which required that the room be repainted and the wood floors be replaced. Because of Nethery's "chemical hypersensitivity," her insurance company supposedly contracted with DAPA for the repairs to be made using special nontoxic glue and paint. DAPA subcontracted with Verona Carpet Warehouse to replace the floors. Nethery alleges in her state court case that when an employee of DAPA painted her living room, DAPA did not use the special non-toxic paint or alternatively had it tinted with regular paint without notice to her. Additionally, Nethery alleges that after one-third of her wood floor had been installed, she was informed that Danny Miles, of DAPA, had authorized the use of toxic glue. Nethery inhaled the fumes from the toxic glue and paint and allegedly suffered bodily injuries and loss of use of her home.

On or before February 18, 1991, American States issued to DAPA Commercial General Liability Policy No. 02-CC-105947-1. DAPA, Danny W. Miles, and The Servicemaster Company have made a demand upon the plaintiff for defense of and coverage for the claims

asserted against them by Nethery. The relevant provisions of the policy provide:

> COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY
>
> 1. Insuring Agreement.
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.
>
> * * * *
>
> b. This insurance applies to "bodily injury" and "property damage" if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
>
> (2) The "bodily injury" or "property damage" occurs during the policy period.
>
> * * * *
>
> 2. **Exclusions.**
>
> This insurance does not apply to:
>
> a. "bodily injury" or "property damage" expected or intended from the standpoint of the insured.
>
> * * * *
>
> f. (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
>
> * * * *
>
> (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations;
>
> * * * *
>
> (i) if the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor; or

* * * *

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals or waste.

* * * *

SECTION V. DEFINITIONS.

9. "occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

The plaintiff's argument that the policy does not provide coverage is asserted under two theories.[2] First, the plaintiff argues that the use of the toxic paint and glue was not an occurrence and therefore any resulting damage is not covered by the policy. Second, if there is an occurrence, then the agent which caused the alleged injury falls within the pollution exclusionary clause. The defendants, DAPA, Inc. d/b/a Servicemaster of Tupelo, Danny W. Miles, and The Servicemaster Company, Limited Partnership, assert that the plaintiffs have an obligation to defend and indemnify them for any judgment from the state court case because the incident which injured Nethery falls within the definition of occurrence and is not excluded by the pollution clause.

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[2] The plaintiff alleges that four other exclusions of the insurance policy are applicable to preclude coverage. In its memorandum brief, the plaintiff does little more than recite the exclusionary clauses. The defendants do not address the merits of these additional exclusions nor does the plaintiff reassert them in his rebuttal brief. The court has contemplated the plaintiff's original assertion and addresses one of them in footnote 3, but as to the remaining exclusionary clauses, finds them not to be applicable or inconsequential to these facts.

Summary Judgment Standard

On a motion for summary judgment, the court must ascertain whether there is a genuine issue of material fact. Fed. R. Civ. P. 56(c). This requires the court to evaluate "whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The United States Supreme Court has stated that "this standard mirrors the standard for directed verdict...which is the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." Anderson, 477 U.S. at 250-51 (citation omitted). Further, the Court has noted that the "genuine issue" summary judgment standard is very similar to the "reasonable jury" directed verdict standard, "the primary difference between the two being procedural, not substantive." Id. at 251. "In essence ...the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52.

As to issues on which the nonmoving party has the burden of proof at trial, the moving party need only point to portions of the

record that demonstrate an absence of evidence to support the non-moving party's claim. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). Once a properly supported motion for summary judgment has been filed, it is incumbent upon the nonmoving party to then go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Id. at 324; see also, Professional Managers, Inc. v. Fawer, Brian, Hardy & Zatzkis, 799 F.2d 218, 221-23 (5th Cir. 1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson, 477 U.S. at 252 (citation omitted). But the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Id. at 255.

It should be pointed out, though, that if the " 'evidentiary facts are not disputed, a court in a nonjury case may grant summary judgment if trial would not enhance its ability to draw inferences and conclusions.'" In re Placid Oil Co., 932 F.2d 394, 398 (5th Cir. 1991) (quoting Nunez v. Superior Oil Co., 572 F.2d 1119, 1124 (5th Cir. 1978). The Placid court recognized, "[I]t makes little sense to forbid the judge from drawing inferences from the evidence submitted on summary judgment when the same judge will act as the trier of fact, unless those inferences involve issues of witness credibility or disputed material facts." Id. (emphasis added).

Discussion

"Where terms of an insurance contracts are ambiguous or doubtful, the contract must be construed most favorably to the insured and against the insurer. Terms of insurance policies are construed favorably to insured wherever reasonably possible, particularly exclusion clauses." State Farm Mut. Auto. Ins. Co. v. Scitzs, 394 So.2d 1371, 1372 (Miss. 1981).

> It is equally well settled law that "the special rules favoring the insured are only applicable when there is an ambiguity ... [and that] courts ought not to strain to find such ambiguities, if, in so doing, they defeat probable intentions of the parties ... even when the result is an apparently harsh consequence to the insured." Courts will neither create an ambiguity where none exists nor make a new contract for the parties. If the policy language is clear, unequivocal, and, hence unambiguous, its terms will be enforced.

Brander v. Nabors, 443 F. Supp. 764, 769 (N.D. Miss. 1978) (internal citations omitted).

"A supplemental rule of construction is that when the provisions of an insurance policy are subject to two interpretations equally reasonable, that interpretation which gives greater indemnity to the insured will prevail." Caldwell v. Hartford Acci. & Indem. Co., 160 So.2d 209 (Miss. 1964). The construction of an insurance contract is limited to an examination of the "written terms" of the policy itself. Employers Mut. Casualty Co. v. Nosser, 250 Miss. 542, 553, 164 So.2d 426, 430 (1964). "The policy itself is the sole manifestation of the parties' intent and no extrinsic evidence is permitted absent a

finding by a court that the language is ambiguous and cannot be understood from a reading of the policy as a whole." Cherry v. Anthony, Gibbs, Sage, 501 So.2d 416, 419 (Miss. 1987).

"The duty of the insurer to defend is determined by the allegations of the complaint." Putman v. Insurance Co. of North America, 673 F. Supp. 171, 176 (N.D. Miss. 1987) (citing Southern Farm Bureau Casualty Insurance Co. V. Logan, 119 So.2d 268, 271 (Miss. 1960)); see also State Farm Mutual Automobile Ins. Co. v. Taylor, 233 So.2d 805, 808 (Miss. 1970). "Only if the pleadings state facts 'bringing the injury within the coverage of the policy' must the insurer defend." Foreman v. Continental Casualty Co., 770 F.2d 487, 489 (5th Cir. 1985) (citing Battisti v. Continental Cas. Co., 406 F.2d 1318, 1321 (5th Cir. 1969)). The allegations of the complaint, not summary judgment arguments, are pertinent to the court's determination of whether the policy provides coverage. This matter is not before the court to try the state court case, but to determine whether the insurance policy provides coverage for the defendants.

The complaint Nethery filed in the Circuit Court of Lee County, Mississippi, has three counts. Count One alleges that the defendants, which include all of the named defendants sub judice as well as Ricky Britt, d/b/a Verona Carpet Warehouse, and Bobby Wright, an employee of Verona Carpet, willfully and wantonly breached their contract with the plaintiff, Nethery, by using

regular glue and plaint. Count Two alleges that the defendants were grossly negligent in using the regular glue and paint. Finally, Count Three alleges such reckless disregard of the plaintiff's known hypersensitivity as to constitute intentional infliction of emotional distress. Additionally, Nethery alleges in her complaint that she explained to Danny Miles her hypersensitivity, and he still authorized Bobby Wright to use "toxic" glue.

Typically, it is the insurer who argues the facts of the complaint are exaggerated, and that they should be constricted or ignored in order to preclude coverage for the incident. In this case, Servicemaster and DAPA seem to argue that Nethery's complaint also contains or should be expanded to include a simple negligence allegation which would provide coverage under the policy. The court does not read the state court complaint to make such allegations. The defendants' argument that they did not intend to injure Nethery is irrelevant. "It is the nature of the claim that is to be considered and not its merits in determining whether a duty to defend is created." Putman, 673 F. Supp. at 176 (citing 14 Couch on Insurance 2d § 51:48 (1982). The underlying complaint clearly alleges in Count One "willfully and wanton breach of the contract" and in Count Three "intentional infliction of emotional distress". As alleged, such conduct could not be accidental, thus

counts One and Three defy the definition of occurrence, and create no duty to defend.[3]

Only the gross negligence claim in Count Two could be considered as an occurrence. Under Mississippi's workers' compensation law, gross negligence has been construed not to be an intentional tort. The Mississippi Supreme Court held in Peaster v.

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[3] The Plaintiff also argues that the insurance policy contains an exclusion clause which precludes coverage for damage resulting from the assumption of liability in a contract or agreement, and that the contract between Nethery's homeowner's insurer and DAPA, Inc., to repair Nethery's home obligated DAPA for any failure of that contract. The language of the exclusion provides:

> 2. **Exclusions.** This insurance does not apply to:
>
> * * * *
>
> b. "bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> (1) assumed in a contract or agreement that is an "insured contract" provided the "bodily injury" or "property damage" occurred subsequent to the execution of the contract or agreement; or
>
> (2) that the insured would have in the absence of the contract or agreement.

The plaintiff only quoted this exclusion, and then asserted that it applied. Servicemaster did not even address it. First, the contract between DAPA and Nethery's insurance company to perform work on Nethery's home did not specifically assume any liability. And second, the court feels that DAPA did not contractually assume any liability to which it was not already legally obligated. Alone, the "Breach of Contract" exclusion would not preclude coverage.

David New Drilling Co., Inc., 642 So.2d 344 (Miss. 1994), that allegations of gross negligence do not elevate a claim above the exclusivity procedures provided under the workers' compensation statutes. Id. 642 So.2d at 348 ("Thus, in the case sub judice, even if the appellants could prove that [the employer] was guilty of gross negligence, such a finding would remain insufficient to create an intentional tort and accordingly remove the appellants' claim from under the Workmens' Compensation Act"). Justice McRae in a dissenting opinion, joined by Justice Sullivan, argues against this conclusion. He points to the law on punitive damages as seemingly holding a contrary position. Punitive damages are recoverable in breach of contract cases "where such breach is attended by intentional wrong, insult, abuse, or such gross negligence as amounts to an independent tort." E.g., Fought v. Morris, 543 So.2d 167, 173 (Miss. 1989). It would seem that the use of the disjunctive "or" equates "intentional wrong" with "gross negligence." The majority in Peaster disagreed. The holding in Peaster is more in line with the pleadings situation in the case at bar. Since pleading gross negligence does not necessarily allege an intentional act, Nethery's complaint does assert an act of the insured which falls within the definition of occurrence.

The plaintiff has argued that the precipitating act which led to Nethery being injured was not an occurrence as defined by the policy. The plaintiff believes that since DAPA, Inc., purposely

painted Nethery's room, then the injury inflicted could not have been an accident, and thus is not an "occurrence." In Allstate Ins. Co. v. Moulton, 464 So.2d 507 (Miss. 1985), the Mississippi Supreme Court established the test for when sequential injuries can be determined to be a product of an accident.

> The only relevant consideration is whether, according to the [complaint], the chain of events leading to the injuries complained of was set in motion and followed a course consciously devised and controlled by [DAPA] without the unexpected intervention of an third person or extrinsic force.

Id. 464 So.2d at 509. "[T]he focus of the occurrence definition is on whether the **act** is 'expected or intended,' and not whether the resulting damage is 'expected or intended.'" USF&G v. T.K. Stanley, Inc., 764 F. Supp. 81, 83 (S.D. Miss. 1991). The questions whether DAPA was grossly negligence in using the toxic paint and glue, and whether they consciously set in motion the eventual injuring agent, seem to the court to be one and the same. That is the ultimate question before the Lee County Circuit Court. It is appropriate that it be decided there. "[T]he duty to defend is broader than the insurer's duty to indemnify under its policy of insurance: the insurer has a duty to defend when there is any basis for potential liability under the policy." Merchants Co. v. American Motorists Ins., 794 F. Supp. 611, 617 (S.D.Miss. 1992) (citing CNA Casualty of California v. Sea board Surety Co., 176 Cal.App.3d 598, 222 Cal.Rptr. 276 (1986) and Liberty Life Ins. Co. v. Commercial Union Ins. Co., 857 F.2d 945, 949 (4th Cir. 1988)).

Whether the plaintiff will be obligated to indemnify DAPA for any judgment which might be rendered in state court will depend upon the jury's answers to the special interrogatories.

Next, the plaintiff argues in great detail that the pollution exclusion precludes coverage for the damage caused by the fumes of the toxic paint. The plaintiff relies upon American States Insurance Company v. F.H.S., Inc., Slip Op. Civil Action No. J92-0644(L)(N) (S.D. Miss. Feb. 3, 1994), wherein Judge Tom Lee held the identical pollution exclusion sub judice to preclude coverage for an ammonia leak at a cold storage warehouse. This court does not disagree with Judge Lee's assessment of the pollution exclusion. It is clear and unambiguous. But just as clear, paint fumes are not pollutants. If this court were to find them to be so, then every injury, which by its definition inherently includes any irritant, would not come under the coverage of an insurance policy with a pollution exclusion. See Westchester Fire Ins. Co. v. Pittsburg, 768 F. Supp. 1463, 1470 (D.Kan. 1991) ("If a child at a city pool complains about chlorine in his or her eyes, the causative factor is a chemical but the city has not polluted the environment..."). The fact that paint fumes do not normally inflict injury, but that ammonia does, distinguishes this case from the situation in F.H.S., Inc. In accordance with the definition of pollution in the insurance policy, all pollutants are irritants. But this does not make all irritants pollutants. Even though paint

fumes can certainly be an irritant to a hypersensitive individual, in the sense that they are an injuring agent, again does not make them a pollutant. The Mississippi Supreme Court has not addressed the issue of how tightly pollution exclusions should be interpreted. It would seem, as in this case, that the use of the pollution exclusion clause is fact dependent.

Accordingly, the plaintiff has no duty to defend or obligation to indemnify DAPA under Counts One and Three of the state court action. But the court finds that the state court complaint filed by Nethery articulates sufficient grounds in Count Two to provide the potential for coverage under the insurance policy purchased by DAPA from the plaintiff. Accordingly, the plaintiff has an obligation to defend the insured for the allegations of Count Two of the pending Lee County Circuit Court case.[4] This court will abstain from deciding whether the plaintiff has an obligation to

[4] Servicemaster Company, Limited Partnership has demanded that the plaintiff defend and indemnify it. Servicemaster is not the insured; DAPA, Inc., purchased the policy and is listed as the insured along with Servicemaster of Tupelo. The court has deduced that Danny Miles is the franchisee of Servicemaster of Tupelo and the owner and president of DAPA, Inc. It appears that Nethery is suing Servicemaster Company, the franchisor, under a theory of respondent superior or some form of vicarious liability. The parties have not informed the court how this brings Servicemaster Company within any coverage of the insurance policy. Actually, Servicemaster has vigorously argued that DAPA d/b/a Servicemaster of Tupelo is not its agent, and that it has absolutely no control or authority over its operation. For purposes of this opinion, the court's finding of the duty to defend is limited to the insured.

indemnify DAPA for any judgment which may be rendered in Count Two, since it is the ultimate question before the state court.

An ORDER in accordance with this Memorandum Opinion shall be entered.

This the _____ day of January, 1995.

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CHIEF JUDGE